



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 4, 2011

Ms. Leticia D. McGowan  
School Attorney  
Dallas Independent School District  
3700 Ross Avenue  
Dallas, Texas 75204

OR2011-06055

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 417604.

The Dallas Independent School District (the "district") received a request for all of the requestor's personnel records, documents, and public information. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>1</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records.

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<sup>1</sup>A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

See 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your argument against disclosure of the submitted information.

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed report and completed evaluations that are subject to section 552.022(a)(1). Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the information subject to section 552.022 under section 552.103. However, section 552.101 of the Government Code is "other law" for the purposes of section 552.022, and we will address whether it applies to the completed evaluations subject to section 552.022.<sup>2</sup> Additionally, we will consider your claim under section 552.103 for the information that is not subject to section 552.022.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, we concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* In addition, the Third Court of Appeals has

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). We find that the completed evaluations subject to section 552.022 consist of evaluations of a teacher; therefore, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, the information that we have marked is generally confidential under section 21.355.

However, we note that section 21.352(c) of the Education Code specifically provides that "[e]ach teacher is entitled to receive a written copy of the evaluation on its completion." In this instance, the requestor is the employee whose evaluations are at issue. Therefore, to the extent the evaluations we have marked are the type contemplated in section 21.352, the requestor has a right of access to this information under section 21.352(c). However, if the requestor does not have a right of access under section 21.352(c), then the evaluations we have marked are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

We next address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). The information at issue relates to the requestor, whose employment was terminated by the district. You state

litigation related to this information is pending because the requestor has appealed this termination and requested the appointment of an independent hearing officer by the Texas Education Agency, to be conducted pursuant to chapter 21 of the Education Code.

This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

Section 21.256 of the Education Code provides that hearings requested under section 21.253 of the Education Code "shall be conducted in the same manner as a trial without a jury in a district court of [Texas]." Educ. Code § 21.256(e). Section 21.256 also specifically affords a teacher the right to be represented by a representative of the teacher's choice; the right to hear the evidence on which the charges are based; the right to cross-examine each adverse witness; and the right to present evidence. *See id.* § 21.256(c). Section 21.256(d) provides that the Texas Rules of Evidence apply at the hearing. *See id.* § 21.256(d). We also note that, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents; an appeal of the proceedings to the commissioner of education is based only on the record of the local hearing; and in a judicial appeal of the commissioner's decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), .301(c) (appeal based solely on local record), .307(e) (substantial evidence rule for judicial review). Therefore, based on the district's representations and our review of the relevant law, we determine a hearing under chapter 21 of the Education Code constitutes litigation for purposes of section 552.103. Consequently, we find that litigation was pending when the district received the request for information. We also find that the information at issue relates to the pending litigation. Thus, we find section 552.103 is generally applicable to the information at issue.

However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information relating to pending litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, some of the information at issue reflects it has been seen or accessed by the requestor, who is the district's only opposing party in the pending litigation. Thus, to the extent the submitted information has been seen or accessed by the requestor, it may not be withheld under section 552.103. *Id.* However, the district may withhold the remaining information that is

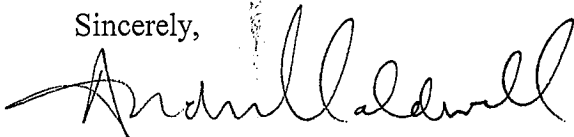
not subject to section 552.022 under section 552.103 of the Government Code. We note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, to the extent the evaluations we have marked are the type contemplated in section 21.352 of the Education Code, the requestor has a right of access to this information, and they must be released pursuant to section 21.352(c). If the requestor does not have a right of access under section 21.352(c), then, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, the evaluations we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. With the exception of the completed report subject to section 552.022 of the Government Code and the information that the requestor has seen or had access to, the district may withhold the submitted information under section 552.103 of the Government Code. The remaining information must be released.<sup>3</sup>

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Andrea L. Caldwell  
Assistant Attorney General  
Open Records Division

ALC/eeg

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<sup>3</sup>We note the requestor has a special right of access to some of the information being released. *See* Gov't Code § 552.023. If the district receives another request for this same information from a different requestor, the district should again seek a decision from this office.

Ref: ID# 417604

Enc. Submitted documents

c: Requestor  
(w/o enclosures)